

No. 83-1306

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In the
Supreme Court of the United States
October Term, 1983

— 0 —
ALTON CLARK BINGHAM,

Petitioner,

v.

NEVADA STATE BOARD OF ACCOUNTANCY,

Respondent.

— 0 —
ON A PETITION FOR A WRIT OF CERTIORARI

— 0 —
RESPONDENT'S BRIEF IN OPPOSITION

— 0 —
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QUESTIONS PRESENTED FOR REVIEW

1. Is there a due process violation when an administrative body, here the Board of Accountancy for the State of Nevada, entertained evidence and made findings which were at variance with the charges in the Complaint?
2. Was there a violation of petitioner's constitutional right to confront witnesses against him?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent for the reasons set forth herein, respectfully requests this Honorable Court to deny Petitioner's Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner argues that this case involves the Fourteenth Amendment to the United States Constitution wherein it is stated:

“Nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction, the equal protection of the law.”

and the Sixth Amendment to the United States Constitution, wherein it is stated:

In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . .”



STATEMENT OF THE CASE

Procedural Background

On September 14, 1979, the Respondent, NEVADA STATE BOARD OF ACCOUNTANCY, (hereinafter referred to as “NSBA”) filed a Complaint, Order to Show Cause and Notice of Hearing directed against the Petitioner, ALTON CLARK BINGHAM, (hereinafter referred to as “Mr. Bingham”), a certified public accountant. Hearings were conducted before NSBA on December 10, 1979, January 28, 29 and February 11, 1980, with NSBA rendering its findings of fact, conclusions of law and a decision on June 26, 1980, revoking Mr. Bingham’s certificate to practice as a Certified Public Accountant in the State of Nevada.

Mr. Bingham sought judicial review of this decision from the Eighth Judicial District Court of the State of Nevada, which, following arguments theretofore, entered its Order on September 7, 1982, affirming NSBA's decision. The Supreme Court of the State of Nevada on September 27, 1983, entered its decision dismissing Mr. Bingham's appeal and on November 9, 1983, denied Mr. Bingham's Petition for Rehearing.

Factual Background

The NSBA's complaint against Mr. Bingham alleged that Mr. Bingham had violated Nevada Revised Statutes 628.390 (2) (4) and (11) and Rule 5.01 of the State Board of Accountancy Rules of Professional Conduct, for he had committed acts "discreditable to the profession."

On October 3, 1979, Mr. Bingham sought a more definite statement and requested production of documents, and based on this application the hearing originally set for October 18, 1979, was continued to December 3, 1979, NSBA then supplied to Mr. Bingham on November 2, 1979, the names and addresses of all witnesses and copies of all documents to be submitted into evidence to support its charge that Mr. Bingham had committed "fraudulent and discreditable acts."

On June 26, 1980, NSBA rendered its findings of fact, conclusions of law, and decision, determining in part that Mr. Bingham did engage in the following acts discreditable to the public accounting profession under NRS 628.390(2) and NRS 628.390(4) and in violation of the Rule 5.01 of the State Board of Accountancy Rules of Professional Conduct: (a) Received \$2,000.00 currency in exchange for a

marker without the debtor being present. The marker ultimately was determined to be fraudulent, (b) Between January 12, 1978 and March 7, 1978, participated in the embezzlement of various funds from the Southpoint Nevada Club, (c) Failed to exercise due diligence in the adherence to internal accounting controls, (d) Failed to adhere to written and diagrammatic system of control submitted to the Gaming Control Board (e) Participated in the collection of the Seekins marker by the transfer of real estate from Mr. Seekins to the owner of the Southpoint Nevada Club and the substitution of the owner's markers for those of Mr. Seekins. The transactions were effected without apparent regard to the Federal and State tax regulations on the exchange, or the possible depletion of company resources, (f) Admitted to two persons that he had embezzled funds by the use of markers and stated to them that he felt that he owed Mr. Jenkins (owner of Southpoint Nevada Club) in the neighborhood of \$50,000.00 to \$55,000.00 as a result of the embezzlements, and (g) Admitted that he forged the signature of Mr. Jenkins on automobile leases, checks and other documents.

REASONS FOR DENYING THE WRIT

As set forth in Rule 17, Rules of the Supreme Court of the United States, a Writ of Certiorari will only be granted when there are special and important reasons therefor, and in making this determination, the Court will consider the criteria set forth the Rule 17. It is submitted to the Court that Mr. Bingham's Petition does not involve a Federal

question in conflict with the decision of another State Court of Record or a Federal Court of Appeals, nor does it involve an important Federal question of federal law which should be settled by this Court.

I.

The decision rendered by the Supreme Court of the State of Nevada does not significantly conflict with decisions of other states on this Federal question.

The decision rendered by the Supreme Court of the State of Nevada determined that Mr. Bingham had received prior notice of the proceedings against him, and as such rejected his contention that his right to due process was violated based on Mr. Bingham's assertion that NSBA rendered findings which were in complete variance with the charges in the Complaint filed thereagainst.

The Nevada Supreme Court, relied on its earlier holding in *Nevada St. Apprenticeship v. Joint Appren.*, 94 Nev. 763, 587 P.2d 1315 (1978), wherein this Court held that, "... due process requirements of notice are satisfied where the parties are sufficiently appraised of the nature of the proceedings so that there is no unfair surprise. The crucial element is adequate opportunity to prepare."

This determination is consistent with the decisions rendered by this Court and the Courts of other States. Additionally, the Nevada Supreme Court as reflected from the short recitation of facts above, properly applied the law to the facts before it.

The authorities cited by Mr. Bingham, *Checker, Inc. v. Public Serv. Comm'n.*, 84 Nev. 623, 467 P.2d 981 (1968);

Grindstone Butte Mut. Canal v. Idaho Power Co., 574 P.2d 901 (Ida., 1978); *State v. Guardian Funeral Home*, 429 P.2d 732 (Okla., 1967); and *Stacey v. Board of Accountancy*, 553 P.2d 1074 (Or., 1976); all dealt with cases where the findings contained in the decision were totally unrelated to the changes contained in the notices, which is in total contradiction to the facts of this case.

II.

The Decision rendered by the Supreme Court of the State of Nevada is consistent with the prior Decision of this Court and other State Courts.

Mr. Bingham argues that NSBA at its hearing improperly allowed into evidence, over objection, a transcript of the testimony given by a Mr. Jenkins to agents of the Nevada State Gaming Control Board. Said testimony was being offered because Mr. Jenkins refused to testify at the hearing after being sworn, by invoking the Fifth Amendment to the United States Constitution.

The Supreme Court of the State of Nevada held in its decision that the statements made in the transcript were sufficiently corroborated by other evidence adduced at Mr. Bingham's hearing, and as such no violation of Mr. Bingham's right to confront an adverse witness occurred, citing *Biegler v. Nevada Real Est. Division*, 95 Nev. 691, 601 P.2d 419 (1979).

This determination is consistent with the determinations of this Court and other State Courts holding that hearsay testimony is sufficient to support an administrative finding. *Richardson v. Perales*, 402 U.S. 389, 409, 91 S.Ct. 1420, 1431, 28 L. Ed.2d 842 (1971).

CONCLUSION

Respondent respectfully requests this Court to deny the Petition for a Writ of Certiorari.

DATED this 14th day of March, 1984.

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